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THE

AMERICAN LAW REGISTER.

MAY, 1856.

OPINION OF THE ATTORNEY GENERAL OF PENNSYLVANIA, UPON THE RIGHT OF THE STATE OF NEW YORK TO DIVERT FROM THEIR NATURAL BED AND CHANNEL, THE WATERS OF THE CHEMUNG RIVER.

Lancaster, December 22, 1855.

His Excellency, James Pollock, Governor of Pennsylvania:

DEAR SIR:—I have given a careful consideration to the question to which you have directed my attention, in conformity with the terms of the resolution passed by the Legislature, approved April 26th, 1855, relative to the right of the State of New York to divert the water from the natural bed and channel of the Chemung river. The preamble of the resolution recites that the State of New York, by the construction of a dam across the Chemung river, near Corning, in said State, supplies with water the Chemung canal, one of its public improvements, and thus diverts the water from the natural bed and channel of said river into the Seneca lake, thereby materially diminishing the capacity of said river to supply the North Branch canal.

The Chemung is a public river of considerable size, the principal branch of which rises in Pennsylvania, and after flowing into New York and traversing a portion of the southern part of that State, again enters Pennsylvania and empties into the north branch of the Susquehanna. As the Seneca lake discharges its waters into lake Ontario, the portion of water which is taken from the Chemung river, as stated in the resolution, to supply the Chemung canal, and is thence conducted into the Seneca lake, is of course never returned into the river after being thus diverted therefrom; and the effect is a serious diminution in the volume of its waters, which may operate injuriously upon the public works of Pennsylvania.

Neither the Chemung in its course through New York, nor the Susquehanna in its course through Pennsylvania, is navigable without the aid of artificial improvements. Each State has a right, in the exercise of its prerogative of eminent domain for the public benefit, to erect dams or other structures upon the river within its boundaries, to improve the navigation thereof in its natural channel, or to use its water as a feeder for its canals. But such use must be so applied as not to injure or encroach upon the rights of the neighboring State: the flow of water cannot be so diverted in any appreciable quantity from its natural channel, that it is not restored to it before it enters the boundaries of the other.

States are equally bound with individuals, to observe in their intercourse with each other, and in their exercise of the rights of dominion, the dictates of natural justice and the rules which govern the use of property; and so to enjoy the gifts of Providence, as not to interfere with the mode of using them which the same Providence has extended to others. Cicero, whose political wisdom was equal to his greatness as an orator and a philosopher, expresses, with much energy, his sense of the obligation of this principle; and Grotius, that profound jurist and eloquent arbiter of national rights, who, beyond all that preceded him, placed the mutual relations of sovereignties upon moral and rational grounds, and sought to awaken the conscience of governments to an elevated sense of international duty, strongly dwells upon and illustrates it, and holds up to censure those writers who aim to weaken the influence of the

sense of justice and of regard for the rights of others, upon the dealings of States with each other. Grot. de jure Belli & Pacis: Proleg. §§ 3–22.

This general position is admitted as an axiom by all modern writers on international law, and is now recognized by all civilized nations. It derives additional force in its application to the different States of this confederacy, from the peculiar nature of the political connection which exists between them. Bound together as members of the same family, their mutual relations are governed by the principles of national law, sanctioned and extended by the Constitution of the Union.

The domain of a State includes the lakes enclosed within it, and the rivers which flow through its territory; but the running water of a river cannot be appropriated, either by a State or its inhabitants, in such manner as to prevent its natural flow into the territories of a State below, and thus to deprive the lower State or its inhabitants of the use of the river and its water in as beneficial a manner as they would otherwise be able to enjoy it. The entire or partial diversion of the waters of a river from its natural channel, so as to make them discharge themselves by another outlet, is an exclusion of the lower State from its right to have the use of the waters of the river without diminution, in its passage through its territory. Grotius (de jure Belli & Pacis, lib. ii., cap. 2, § 12,) distinguishes between a river and its flowing water, and says, "sic flumen, qua flumen dicitur, proprium est populi cujus intra fines fluit, vel ejus, cujus in ditione est populus: atque ei licet molem in flumen injicere: quæ in flumine nascuntur ejus sunt. At idem flumen, qua aqua profluens vocatur, commune mansit." It is upon an extension of this principle, that he places, §§ 13, 14, the correlative right of the upper proprietor of passages on a navigable river running through the territory of the proprietor below, a right which has always been claimed by the United States, and was strenuously insisted upon by them in the discussions concerning the navigation of the Mississippi and the St. Lawrence. See Wheaton's International Law, p. 253–263.

The principal codes of municipal law have provided for the pro-

tection of the lower proprietor from infringement of his right to the accustomed flow of water. Thus the civil law: Dig. lib. 42, tit. 13: "Ait prætor, in flumine publico, inve ripa ejus facere, aut in id flumen ripamve ejus immittere, quo aliter aqua fluit quam priori æstate fluxit, veto." Id. § 3: "Generaliter dicendum est, ita demum interdicto quem teneri, si mutetur aquæ cursus per hoc, quod factum est, dum vel depressior vel arctior fiat aqua, ac per hoc rapidior sit cum incommodo accolentium. Et si quod aliud vitii accolæ ex facto ejus, qui convenitur, sentient, interdicto locus erit."

To the same effect is the French civil code: See Cod. Civ. tit. 40, chap. 1, §§ 640–643.

The common law is equally explicit in defining the rights and mutual obligations of the owners of land through which a stream of water flows. Its maxim is, *aqua currit et currere debet ut currere solebat.* In *Wright* vs. *Howard*, 1 Sim. & Stu. 190, the Vice Chancellor, in delivering his judgment, gives this clear and comprehensive view of the subject: "Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." These views were commented on and confirmed by the Court of King's Bench, in *Mason* vs. *Hill*, 3 B. & Ad. 304, (23 E. C. L. 76.) and 5 B. & Ad. 1, (27 E. C. L.) and the notion that the first occupant of running water acquired any right by his prior appropriation, was repudiated as fallacious. I might multiply authorities upon this point, but it will suffice to refer to the full recognition of the doctrine by the courts of New York, in the cases of *Crooker* vs. *Bragg*, 10 Wend. 260; and *Arnold* vs. *Foot*, 12 Wend. 330; and to the succinct summary of Chancellor Kent, 3 Com. 536.

Reason and authority unite in condemning the action of the State of New York, set forth in the resolution referred to, in diverting the water from the natural bed and channel of the Chemung

river, to the prejudice of our public improvements, as a wrong inflicted upon Pennsylvania, of which our State has great reason to complain, and which she is entitled to insist upon having redressed.

I am, very respectfully,

Yours, &c.,

THOS. E. FRANKLIN,

Attorney General.

RECENT AMERICAN DECISIONS.

In the United States Court of Claims.

J. ALEXIS PORT *vs.* THE UNITED STATES.

1. In all cases of the sale of personalty, there is an implied warranty of title.
2. Where the United States, while at war with Mexico, seized and sold certain tobacco as enemy's property, which subsequently proved to be otherwise, the purchase money paid by the vendee can be recovered.
3. The authority of military commanders in time of war considered.

The opinion of the Court was delivered by

GILCHRIST, C. J. — The facts in this case, as they are stated in the petition, are — that, on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order, Captain Webster advertised, on the 16th of October, for sale, at auction, on the 19th of October, five hundred bales of tobacco. On the 21st day of October the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of $12,000, for which he paid $8,000 in cash, and gave the United States credit for $4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant and the United States, after the sale of the tobacco and the payment of the price by the claimant.